

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

IN THE MATTER OF APPLICATION FOR)
BENEFICIAL WATER USE PERMIT NO.)
18,860-s76H BY MAURICE AND SONJA) FINAL ORDER
O'CONNOR)

The Proposed Findings of Fact, Conclusions of Law, and Order as entered by the Hearing Examiner on April 16, 1980, are hereby adopted as the Findings of Fact, Conclusions of Law, and Order.

FINAL ORDER

Application for Beneficial Water Use Permit No. 18,860-s76H by Maurice and Sonja O'Connor is hereby denied.

RECOMMENDATION

It is recommended that persons diverting water from the Thayer Ditch and its laterals construct a proper headgate at the point where water is diverted from Mill Creek into the Thayer Ditch.

Regarding new appropriations from the Thayer Ditch; the Department can only grant a permit to appropriate water from a source of supply, in this case, Mill Creek. Without a proper diversion structure on Mill Creek, the amount of water flowing down the Thayer Ditch cannot be regulated to protect prior downstream rights on Mill Creek.


NOTICE

The Hearing Examiner's Final Order may be appealed in accordance

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1 with the Montana Administrative Procedures Act by filing a petition in
2 the appropriate court within thirty (30) days after service of the
3 Final Order.

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5 DATED this 2nd day of May, 1980.

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8 DAVID L. PENGELLY, D.N.R.&C.
9 HEARING EXAMINER
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BY THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

BY THE WATER OF APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
NO. 18,360-s76H BY MAURICE AND)
GREGG O'CONNOR)

Pursuant to the Montana Water Use Act and the Montana Administrative Procedures Act, after due notice, a hearing was held on February 5, 1980, in the Council Chambers of the Missoula City Hall, Missoula, Montana, for the purpose of hearing objections to the above-named Application for Beneficial Water Use Permit No. 18,360-s76H, David Pengelly, Hearing Examiner, presiding.

The hearing on this matter was held concurrently with the hearings on Application for Beneficial Water Use Permit No. 15,150-s76H by Jim and Ethel Prelat and Application for Beneficial Water Use Permit No. 13,503-s76H by Clarence H. Leister.

The Applicant, Maurice O'Connor, appeared at the hearing and presented testimony in support of the Application. Mr. O'Connor was represented by legal counsel, Mr. Chris Swartley, Missoula, Montana. No exhibits were introduced supporting the Application.

Eight (8) Objectors were present at the hearing: Mr. William J. Blair, Mrs. Marie E. Greydanus Mrs. Richard Jochinsen, Mr. William D. Lane, Mr. William E. Mytty, Mrs. Sue Umstead, Mr. Gene Whitaker and Mr. Tony Zens. Messrs. Blair, Mytty and Zens were represented by legal Counsel, Mr. George Goodrich, Missoula, Montana. Mr. Goodrich also represented Mr. and Mrs. Eric Skibsted, who were not present at the hearing. Mrs. Greydanus was represented by Counsel, Mr. John F. Patterson,

1 Missoula, Montana. The Montana Power Company objected to Application
2 No. 18,860-s76H but was not represented at the hearing.

3 Those testifying against Application No. 18,860-s76H were Mr.
4 Blair, Mr. Goodrich (on behalf of his clients), Mr. Mytty, Mr. Whitaker,
5 Mr. Zens, Mrs. Jochinsen and Mr. Lane.

6 Mr. Whitaker introduced three (3) exhibits supporting his objection,
7 to wit:

8
9 Objector's Exhibits:

10 O-1 Photographs (11) depicting diversions and uses of water along
11 the Thayer Ditch.

12 O-2 Assignment of Contract for Deed

13 O-3 Permission to Assign Contract for Deed

14
15 The Objector's Exhibits were marked accordingly and received into the
16 record without objections.

17 Montana Department of Natural Resources and Conservation personnel
18 present and testifying on behalf of the Department were: Larry Brown,
19 Hydrologist; Arlin Krogstad, Hearing Representative; and Jan Mack,
20 Missoula Water Rights Bureau Field Office Manager. Also present was
21 Vicki Woodrow, Hearing Recorder. The Department was not represented by
22 legal counsel. Two (2) exhibits were introduced by the Department, to
23 wit:

24 Department's Exhibits:

25 D-1 Plat map showing location of Applicant's and Objectors'
26 properties

27 D-2 Copy of map from Missoula County Water Resources Survey, part
28 2, page 5, showing location of irrigated lands and irrigation

ditches.

The Department's Exhibits were marked accordingly and received into the record without objection.

MOTION

At the Pre-hearing Conference held on November 8, 1979, a motion was made by Mr. George Goodrich, Counsel for several objectors, to deny the Application since the Department had not acted on the Application within the 180 day time limit set under the Montana Water Use Act (85-2-310, MCA, 1979). Motion by Counsel is denied since the purpose of Section 85-2-310 is to protect an Applicant from inaction by the Department, not Objectors.

SUMMARY OF RECORD

1. On May 18, 1978, the Department received an Application for Beneficial Water Use Permit No. 18,860-s76H by Maurice and Sonja O'Connor to appropriate 30 gallons per minute of water, and not to exceed 8.5 acre-feet per annum from Mill Creek, a tributary of Lolo Creek in Missoula County, Montana. The water is to be diverted from Mill Creek by means of the Thayer Ditch, at a point in the SW1/4 NW1/4 NE1/4 of Section 3, Township 11 North, Range 21 West, M.P.M., and used for new sprinkler irrigation on a total of 3 acres, more or less, in the SE1/4 of Section 34, Township 12 North, Range 21 West, from May 15 to October 15, inclusive, of each year, and domestic purposes from January 1 to December 31, inclusive, of each year.

2. On September 20, 27 and October 4, 1978, the Department caused to be duly published in the Missoulian, Missoula, Montana, notice of

Application for Beneficial Water Use Permit No. 18,860-s76H.

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1 3. On October 13, 1978, the Department received an objection to
2 the above Application from the Montana Power Company.

3 4. On October 19, 1978, the Department received an objection to
4 the above Application from Richard Jochinsen.

5 5. On November 3, 1978, the Department received objections to the
6 above Application from Fred J. and Verna M. Glantz and Marie Thayer
7 n/k/a Marie Greydanus. Mr. and Mrs. Glantz sold their property and
8 water right to Jerry and Sue Umsted, who continued with the objection.

9 6. On November 6, 1978, the Department received an objection to
10 the above Application from Merle and Betty Laber. Mr. and Mrs. Laber
11 sold their property and water right to William D. Lane, who continued
12 with the objection.

13 7. On November 6, 1978, the Department received objections to the
14 above Application from George Goodrich on behalf of Mr. and Mrs. William
15 J. Blair, Mr. and Mrs. William E. Mytty, Jr., Mr. and Mrs. Eric Skibsted
16 and Mr. Tony Zens.

17 8. On December 13, 1979, Mr. Gene Whitaker was admitted by the
18 Hearing Examiner as an untimely Objector to the above Application.

19 9. Mr. O'Connor testified that the water system he proposes to use
20 under the above Application was already in place when he and his wife
21 purchased their property in 1965. Mr. O'Connor stated that he has used
22 water since 1965 from the Thayer Ditch without receiving any objections;
23 therefore he feels there are unappropriated waters available. He further
24 testified that water was unavailable only one (1) year in the 14 or 15
25 years he has been using the water. Mr. O'Connor also testified that he
26 has observed water flowing into Lolo Creek after passing the last point
27 of diversion out of the Thayer Ditch; thus he feels there is water
28 available that is not being put to beneficial use. Mr. O'Connor testified

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1 that he has no control over the diversion point where water is diverted
2 from Mill Creek into the Thayer Ditch. Mr. O'Connor stated that water
3 is diverted into a Hines Ditch which may also be available for appropriation.
4 Mr. O'Connor proposes to water a lawn and garden and also use the water
5 for domestic purposes. The Applicant proposes to pump water from the
6 Thayer Ditch using a one (1) horsepower pump and a one (1) inch line.
7 Under cross-examination by Mr. Goodrich, Mr. O'Connor testified that he
8 has been using water for 15 years because he thought he had a water
9 right. Under cross-examination by Mr. Krogstad, Mr. O'Connor stated
10 that the source of supply for this Application is Mill Creek; and the
11 Applicant has no plans for measuring the water diverted from Mill Creek.

12 10. Mr. Whitaker, an Objector, testified that he owns 20.4 acres
13 for which he has a five (5) inch high water right to be used on 10.4
14 acres to be delivered through the Thayer Ditch. Mr. Whitaker further
15 testified that for seven (7) summers he has cleaned and rebuilt ditches
16 from the Mill Creek drainage down through the Thayer Ditch. Mr. Whitaker
17 further testified that in the seven (7) summers he has lived in the
18 area, there has been no water, high water, or excess water after about
19 the first of September, and he has lost crops all seven years due to a
20 shortage of water. Under cross-examination by Arlin Krogstad, Mr.
21 Whitaker testified that he diverts water from the end of April to approximately
22 September 15.

23 11. Mr. George Goodrich testified on behalf of his clients, Mr.
24 Zens; Mr. and Mrs. Mytty; Mr. and Mrs. Blair; and Mr. and Mrs. Skibsted.
25 His clients possess water rights which were decreed in June of 1937 in
26 the Case of Warden vs. Anderson in Cause No. 12336, Missoula, County,
27 Montana. Mr. Zens has a decreed right from Mill Creek with a priority
28 date of June 1, 1886 for a total flow of 100 miner's inches. Mr. Blair

1 and Mr. Mytty share a decreed right for 67 1/2 miner's inches from Mill
2 Creek, also with a priority date of June 1, 1886. Mr. Goodrich further
3 testified that the primary basis of his clients objections to this
4 Application is that there are no unappropriated waters in Mill Creek.
5 Mr. Goodrich testified that his clients feel that the Applicant has a
6 sufficient portion of the 40 inch Thayer right and that his clients
7 object to the issuance of any further permits for the appropriation of
8 water from Mill Creek.

9 12. Mr. Zens testified that there are 207 1/2 inches of decreed
10 water and that any water in excess of this decreed water is considered
11 high water. Mr. Zens stated that he's been using water since 1950, a
12 period of 30 years, and that he has a good understanding of when the
13 water is high and when it is low. He stated that generally there's high
14 water for approximately one (1) month and then there is usually another
15 month in which there is sufficient water to satisfy decreed rights, but
16 towards the end of July, there's only about 100 inches of water left in
17 the whole creek. Mr. Zens stated that by the end of July, generally
18 there is not sufficient water in the creek to satisfy the decreed rights
19 and that out of the 100 inches of water that may be available, he and
20 Mr. Blair and Mr. Mytty only receive about 50 inches of that water even
21 though their right says that they are entitled to 167 1/2 inches. Mr.
22 Zens stated that he and Mr. Blair and Mr. Mytty start using the water in
23 April and use it at least until the end of August and maybe even into
24 September. Mr. Zens stated that he irrigates about 50 acres of cropland
25 and when water is available he irrigates some pastureland also.

26 13. Mr. Mytty testified that he and Mr. Zens and Mr. Blair all use
27 the same point of diversion from Mill Creek. They have a headgate off
28 of Mill Creek which drops the water into a cistern and from there they

1 divert out of the cistern with a pipe into their irrigation systems.

2 Mr. Mytty stated that although they do use water from April to August
3 for irrigation, that they (Messrs. Zens, Mytty and Blair) also water
4 stock using this water right so that the period of use is even longer
5 than that stated by Mr. Zens. Mr. Mytty stated that he irrigates about
6 45 acres.

7 14. Mr. Blair testified that he irrigates 18 acres of land.

8 15. Mrs. Jochinsen testified that quite often during the summer
9 they do not get water and that her husband has to walk the ditch and
10 kick out dams where people have taken all the water (by "ditch", Mrs.
11 Jochinsen meant Thayer Ditch). Mrs. Jochinsen testified that they have
12 a three (3) miner's inch right from the 40 miner's inches of the original
13 Thayer water right. The Jochinsen's have a pond which they irrigate out
14 of and whenever they are not appropriating water for irrigation, water
15 runs into their pond and out the other end on down the ditch. She
16 testified that they irrigate probably two (2) to three (3) times a week.
17 The Jochinsen's irrigate approximately three (3) acres.

18 16. Mr. Lane testified that he owns approximately 10 acres which
19 are fed by two (2) branches of the Thayer Ditch. The first branch
20 enters his property through Leister's property and the second comes from
21 Umstead's and O'Connor's land onto his property. Last summer, from the
22 Fourth of July on, the ditch entering the rear seven (7) acres of Mr. Lane's
23 land was completely dry. Mr. Lane testified that the water rights he
24 purchased with his property included two (2) inches of high water and
25 three (3) inches of the original 40 inch Thayer Decreed water right.
26 Mr. Lane further testified that he intends to irrigate eight (8) of the
27 ten (10) acres that he owns. Besides irrigation, he intends to water
28 livestock, but only during the irrigation season.

1 17. Under cross-examination by Chris Swartley, Larry Brown testified
2 that he measured the flow in Mill Creek on August 13, 1979. Mr. Brown
3 testified that at the time he measured the flow in Mill Creek, there was
4 more water flowing down the Thayer Ditch than down the central channel
5 of Mill Creek. Mr. Brown did not observe whether there was any water
6 flowing into Lolo Creek from Mill Creek at that time.

7
8 PROPOSED FINDINGS OF FACT

9 1. The Applicant presented no evidence that there are unappropriated
10 waters in the source of supply at times when the water can be put to the
11 use proposed by the Applicant, in the amount the Applicant seeks to
12 appropriate, or that throughout the period during which the Applicant
13 seeks to appropriate, the amount requested is available (underlined for
14 emphasis).

15 2. The Applicant presented no evidence that the rights of prior
16 appropriators would not be adversely affected.

17 3. The Applicant presented no evidence to show that the proposed
18 means of diversion or construction are adequate. The Applicant stated
19 that there is no control structure at the proposed point of diversion
20 from Mill Creek, which is the source of supply, and further that he has
21 no plans for measuring the water diverted from Mill Creek.

22 4. The proposed use of water is a beneficial use.

23 5. The proposed use will not interfere unreasonably with other
24 planned uses or developments for which a permit has been issued or for
25 which water has been reserved.

26
27 PROPOSED CONCLUSIONS OF LAW

28 1. Section 85-2-311, MCA, 1979, states that "The Department shall

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1 issue a permit if:

2 1. there are unappropriated waters in the source of supply:

3 a. at times when the water can be put to the use

4 proposed by the applicant;

5 b. in the amount the applicant seeks to appropriate; and

6 c. throughout the period during which the applicant

7 seeks to appropriate, the amount requested is

8 available;

9 2. the rights of a prior appropriator will not be adversely

10 affected;

11 3. the proposed means of diversion or construction are adequate;

12 4. the proposed use of water is a beneficial use;

13 5. the proposed use will not interfere unreasonably with

14 other planned uses or developments for which a permit

15 has been issued or for which water has been reserved; . . ."

16 2. Based on the record (testimony presented at the hearing and
17 information in the Department's file) it is concluded that there are no
18 unappropriated waters in the source of supply at times when the water
19 can be put to the use proposed by the Applicant, in the amount the
20 Applicant seeks to appropriate, or throughout the period during which
21 the Applicant seeks to appropriate, the amount requested is available.

22 3. Based on the record, it is concluded that the right of prior
23 appropriators would be adversely affected if this permit were issued.

24 4. Based on the record, it is concluded that the proposed means of
25 diversion or construction are not adequate.

26 5. Based on the record, it is concluded that the proposed use of
27 water is a beneficial use.

28 6. Based on the record, it is concluded that the proposed use will

1 not interfere unreasonably with other planned uses or developments for
2 which a permit has been issued or for which water has been reserved.

3 Based on the Proposed Findings of Fact and Conclusions of Law, the
4 following Proposed Order is hereby made:

5
6 PROPOSED ORDER

7 Application for Beneficial Water Use Permit No. 18,860-s76H by Maurice and
8 Sonja O'Connor is hereby denied.

9
10 RECOMMENDATION

11 It is recommended that persons diverting water from the Thayer
12 Ditch and its laterals construct a proper headgate at the point where
13 water is diverted from Mill Creek into the Thayer Ditch.

14 Regarding new appropriations from the Thayer Ditch; the Department
15 can only grant a permit to appropriate water from a source of supply, in
16 this case, Mill Creek. Without a proper diversion structure on Mill
17 Creek, the amount of water flowing down the Thayer Ditch cannot be
18 regulated to protect prior downstream rights on Mill Creek.

19
20 NOTICE

21 This Proposed Order is offered for the review and comment of all
22 parties of record. The review and comment period shall commence with
23 the receipt of this Proposed Order and shall end ten (10) days thereafter.
24 No extensions of time for comment will be granted.

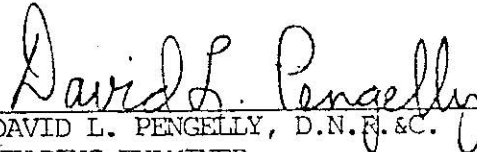
25 The Final Order in this matter will be sent to all parties by
26 certified mail.

27 The Hearing Examiner's Final Order may be appealed in accordance
28 with the Montana Administrative Procedures Act by filing a petition in

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1 the appropriate court within thirty (30) days after service of the Final
2 Order.

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4 DATED this 16th day of April, 1980.

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7 DAVID L. PENGELLY, D.N.R.&C.
8 HEARING EXAMINER
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